

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNILOC 2017 LLC,

Plaintiff,

v.

SAMSUNG ELECTRONICS AMERICA, INC.,
and SAMSUNG ELECTRONICS CO. LTD.,

Defendants.

Case No.: 2:18-cv-00508-JRG-RSP

**PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION
TO STRIKE PORTIONS OF DR. WILLIAM "CHUCK" EASTTOM II
AND UNILOC'S AMENDED INFRINGEMENT CONTENTIONS**

Plaintiff Uniloc 2017 LLC (“Uniloc”) respectfully submits this Sur-Reply in opposition the Motion to Strike, Dkt. 77 (“Motion”) filed by Defendants Samsung Electronics America, Inc. and Samsung Electronics Co Ltd.’s (collectively “Samsung”).

Samsung, once again, buries the lead. Samsung, once again, claims it should have been expected and obvious that the Court would adopt Samsung’s proposed construction that there is “only one” linked user identification module that permits “normal operation” of the claimed device. Dkt. No. 99 (Reply) at 1, 2, 3, 4. But, once again, that was not Samsung’s proposed construction until two weeks before the claim construction hearing.

Samsung, incongruously, acknowledges that it altered its construction in December 2019, but does not agree that it “changed” its construction for the term “linked user identification module.” Indeed, Samsung alleges (using italics) that

Samsung did not *change* its construction. Rather, to narrow the disputes for the claim construction hearing, Samsung dropped certain elements of its proposed construction which were irrelevant to both non-infringement and invalidity.

Id. at 2 (emphasis in original). This is a decidedly peculiar argument. Again, here is Samsung’s construction from September 2019:

a user identification module whose data has been read by, and stored on, the mobile radio telephony device, and that is the only one that permits normal operation of the device.

And, here is Samsung’s construction from December 2019:

a user identification module that is the only one that permits normal operation of the device.

To start, it is double-speak to suggest that this is not a “*change*.” The September 2019 construction was thirty-one-words-long and sought to add four extraneous limitations. The December 2019 construction is sixteen-words-long and has one additional limitation. Further, the point of claim construction is to “determine[e] the meaning and scope of the patent claims

asserted to be infringed.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995), aff’d, 517 U.S. 370 (1996). The point is most assuredly *not* to insert elements to address “both non-infringement and invalidity.” By arguing otherwise, Samsung admitted that its original construction was an attempt to lard up this key term with extraneous limitations in the hope of avoiding infringement or invalidating the claim. But, recognizing the futility of its original proposal, it “dropped certain elements of its proposed construction.”

Samsung insists that the proper time to amend infringement contentions is at the time of claim construction briefing. Dkt. No. 99 at 1. Even if that is true, it brings us back, then, to Samsung’s original proposal, *i.e.*, the proposal that was *actually argued* during claim construction. In that proposed construction, Samsung sought to insert four limitations into the claim, apparently for purposes of “both non-infringement and invalidity”:

- the user identification module has data;
- that data has been read by the mobile radiotelephony device;
- that data has been stored on the mobile radiotelephony device; and
- the user identification module is the only one that permits normal operation.

The Court did not adopt this construction. Yes, one of the four limitations Samsung sought in its September 2019 proposal remained in Samsung’s December 2019 proposed construction; and, yes, the Court did adopt that construction less than one month later. But, how could Uniloc have anticipated this change? There was no suggestion before December 2019 that Samsung would move off of its thirty-one-word proposal. And, even if there had been such a suspicion, how could Uniloc have known which—and how many—of the four limitations would remain?

The following chart shows the key events in the cycle of infringement contentions and claim construction, and the short window during which Uniloc might have amended in light of Samsung’s “narrowed” construction:

11/2018	Uniloc sues Samsung for infringement.
12/2018	
01/2019	
02/2019	
03/2019	Uniloc serves Infringement Contentions.
04/2019	
05/2019	
06/2019	
07/2019	
08/2019	Parties identify terms for construction.
09/2019	Samsung proposes “a user identification module whose data has been read by, and stored on, the mobile radio telephony device, and that is the only one that permits normal operation of the device” as construction for “linked user identification module.”
10/2019	
11/2019	
12/2019	Samsung proposes “a user identification module that is the only one that permits normal operation of the device.”
01/2020	Claim construction hearing.
02/2020	Magistrate Judge Payne issues claim constructions.
	Objections to claim constructions overruled.

Unless the Court believes that Uniloc was required to amend its Infringement Contentions after claim construction briefing was complete, and specifically during the two-week interval between when [1] Samsung suggested a claim construction that did not—in Samsung’s words—attempt to insert limitations to address “both non-infringement and invalidity,” and [2] the claim construction hearing, then Uniloc’s Amended Infringement Contentions were timely. And, if that amendment was timely, then the Samsung’s Motion boils down to the following: In September 2019, Samsung proposed a thirty-one-word, four-limitation construction for the key term “linked user identification module.” Neither this Court, nor the *Motorola* court, nor Uniloc, nor even Samsung now, suggests that Samsung’s original construction was correct. Three months after making its proposal, and after all briefing was complete, Samsung revised its proposal just two weeks before the claim construction hearing. The Court accepted Samsung’s revised proposal, and so Uniloc timely amended its Infringement Contentions to match that construction. Uniloc also timely served its expert report on infringement, again based upon that construction.

If Uniloc had amended its Infringement Contentions back during the claim construction briefing, such amendment would have captured the Court’s final construction only by shotgun approach. Indeed, if Uniloc had amended based upon Samsung’s proposed constructions from September 2019, Uniloc would have fruitlessly amended as to nine terms, because Judge Payne rejected Samsung’s constructions for all save two and the December 2019 construction of “linked user identification module.”

If Uniloc timely amended its Infringement Contentions in light of P.R. 3-6(a), which does not require leave of court, then Samsung’s other arguments fall to the floor. To the extent the

Court believes that Uniloc should have sought leave to amend pursuant to P.R 3-6(b), Uniloc's Opposition laid out those elements.

Finally, it is worth pointing out that Samsung's argument regarding eSIMs appears to require precognition or telepathy. Samsung argues:

Uniloc does not dispute that the original Infringement Contentions do not identify eSIMs or allege how any product that utilizes an eSIM could satisfy the "mounting" limitations of the asserted claims.

Dkt. No. 99 at 3-4. Of course Uniloc's Infringement Contentions did not include allegations regarding eSIMs. Indeed, even if Uniloc had amended its Infringement Contentions in December 2019, those contentions would not have mentioned eSIMs. As Uniloc explained in its Opposition, Samsung did not release mobile telephones with eSIMs until the week before discovery closed in February 2020.

For the foregoing reasons, and for those stated in Uniloc's Opposition, Uniloc respectfully requests that Samsung's Motion be denied.

Date: April 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Aaron S. Jacobs